



CENTRE FOR THE STUDY OF
EUROPEAN LABOUR LAW
"MASSIMO D'ANTONA"

Working Papers

A tale of oversimplification and deregulation: the mainstream approach to labour market segmentation and the recent responses to the crisis in European countries

WP CSDLE "Massimo D'Antona".INT – 102/2013

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WP CSDLE MASSIMO D'ANTONA.IT - ISSN 1594-817X
Centre for the Study of European Labour Law "MASSIMO D'ANTONA", University of Catania
On line journal, registered at Tribunale di Catania n. 1/2012 – 12.1.2012
Via Gallo, 25 – 95124 Catania (Italy)
Tel: +39 095230855 – Fax: +39 0952507020
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<http://csdle.lex.unict.it/workingpapers.aspx>



A tale of oversimplification and deregulation: the mainstream approach to labour market segmentation and the recent responses to the crisis in European countries^{α αα}

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^α This paper has been originally published as *De Stefano, Valerio, A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and the Recent Responses to the Crisis in European Countries* (December 5, 2013). *Bocconi Legal Studies Research Paper*. Available at SSRN: <http://ssrn.com/abstract=2363932>. and re-edited in this series by request of the Author.

^{αα} I owe special thanks to Francesco Corsello, Simon Deakin, Maurizio Del Conte and Ewan McGaughey and Bart Ullstein for their precious feedbacks. I benefited greatly from discussions with Nicola Countouris (during my period as a visiting academic at UCL, in 2012, and afterwards), Stefano Liebman and Silvana Sciarra and with the participants and organizers of the ILO Research Workshop, *Employment Quality in Segmented Labour Markets*, Geneva, 2013. Finally, this paper was written during my postdoctoral membership at Clare Hall College, the University of Cambridge, in 2013: I wish to thank deeply Clare Hall and its president, David Ibbetson for their hospitality. The usual disclaimer applies.

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1. Introduction

During the last 30 years there has been a distinct growth of labour market policies professedly aimed at promoting the creation of employment¹ through the use of non-standard work contracts², such as fixed-term and/or part-time employment or temporary agency work (TAW).

In most of the cases, these reforms neither significantly affect the standard, open-ended, full-time contract of employment nor the relevant dismissal regulations.

This “flexibility at the margin” approach has now been called into question even by those institutions that had previously advocated deregulation of non-standard and “flexible” forms of employment:³ the risk, it is now argued, is that workers, particularly young workers, women or workers belonging to disadvantaged groups, are “trapped” in an endless series of precarious, instable working contracts for a considerable amount of their working lives.

It is suggested, in particular, that facilitating the use of temporary work contracts, without reforming the open-ended employment relationship by loosening protection against dismissal, has been the cause of a negative segmentation of the labour market.

Additionally, strong dismissal protection is argued to incentivize employers to look for contractual arrangements granting the elimination or reduction of termination costs.

These costs would generate “dualism” of labour markets, namely a sharp division between the labour market of insiders, the “guaranteed” with permanent contracts and high protection from employers’

¹ There is no consensus on the potentialities of using temporary work contracts as a «stepping stone» towards stable jobs. See F. Berton, F. Deficienti, L. Pacelli, *Are temporary jobs a port of entry into permanent employment? Evidence from matched employer-employee data*, in *Department of Economics and Public Finance “G.Prato” Working Paper Series*, No.6 – June 2009; G. Barbieri, P. Sestito, *Temporary workers in Italy: Who Are They and Where They End Up*, in *Labour*, 22, 2008, 1, pages 127-166; A.L. Booth, M. Francesconi, J. Frank, *Temporary jobs: stepping stones or dead ends?*, in *The economic Journal*, 112(480), 2002, pages. 189-213.

² For a comparative overview of fixed-term work regulation in France, Germany, Italy, Spain and the UK, see B. Caruso, S. Sciarra, *Flexibility and Security in Temporary Work: A Comparative and European Debate*, in *WP C.S.D.L.E. “Massimo D’Antona” .INT – 56/2007*.

³ For instance, Directive 2008/104/EC and Directive 1999/70/EC indicate non-standard forms of employment as an effective way to, respectively “contribute to job creation” and to “respond, in certain circumstances, to the needs of both employers and workers”. See also, *The OECD Jobs study. Facts, Analysis, Strategies*, 1994.

termination, and the market of the outsiders, the "not-guaranteed" forced into a prolonged and indefinite series of non-standard contracts characterized by high instability⁴.

Segmentation of the labour market, as a direct result of the regulations governing dismissal, is an issue currently under discussion at the economic, legal and political institutions in different European countries. According to the EU Commission, for instance, in order to tackle the issue of segmentation, "*employment protection legislation should be reformed to reduce over-protection of workers with permanent contracts, and provide protection to those left outside or at the margins of the job market*"⁵. Accordingly, several reforms have been proposed or enacted across EU Member States in recent years to address these issues.

In a recent paper, Simon Deakin provided an extensive overview of the economic and legal theories of labour market segmentation⁶. Subsequently, he also identified three types of institutional responses to segmentation, followed by several European countries in recent years: (i) a first technique implies changes in the scope of labour law protections, including "*legal measures that widen the definition of wage-dependent labour and minimize or remove qualifying thresholds*" in order to have "*fewer workers [...] excluded from the 'core' protected category*"; (ii) the second type of responses concerns "*the content of labour law protections*", for instance, by "*mandating equal (or pro rata) protections for workers in atypical work relationships to those in the 'core' ('levelling up')*" and/or "*reducing the protections which apply to the workers in the core, so as to bring them closer into line with those in the atypical*

⁴ See. Bouis R., Causa O., Demmou L., Duval R., Zdzienicka A., *The Short-Term Effects of Structural Reforms: An Empirical Analysis*, in *OECD Economic Department Working Papers*, No. 949, 2012, OECD Publishing; O. van Vliet, H. Nijebor, *Flexicurity in the European Union: Flexibility for Outsiders, Security for Insiders*, Leiden Law School, Department of Economics Research Memorandum 2012.2; S. Bentolila, J. F., Jimeno, J. J. Dolado, *Reforming an Insider-Outsider Labor Market: The Spanish Experience*, in *Working Papers*, 2012-01, FEDEAT. Boeri, P. Garibaldi, *Two Tier Reforms of Employment Protection: a Honeymoon Effect?*, in *Economic Journal*, Royal Economic Society, 117(521), 2007, pages 357-385; O. Blanchard, A. Landier, *The Perverse Effects of Partial Labor Market Reform: Fixed Duration Contracts in France*, in *Economic Journal* 112, 2002, pages 214-244.

⁵ EU Commission, *Communication from the Commission to the European Parliament, the European economic and social committee and the Committee of Regions, Annual Growth Survey: advancing the EU's comprehensive response to the crisis*, *Annual Growth Survey: advancing the EU's comprehensive response to the crisis*, COM(2011) 11 final. A similar approach is followed by OECD, *Economic Policy Reforms: Going for Growth 2012*.

⁶ S. Deakin, *Addressing labour market segmentation: The role of labour law*, Working Paper no. 52, Governance and Tripartism Department, International Labour Office, Geneva, October 2013.

categories ('levelling down')"; (iii) techniques within the latter category make use of the law "to stimulate alternative mechanisms of labour market regulation" such as "collective bargaining, training policy, and fiscal incentives".

Grouping legal responses into these three categories is helpful in assessing the scope of recent labour market regulation reforms across Europe. These categories, however, do not necessarily have rigid confines: it will be argued below that they may have rather "fluid" or "flexible" borders, with some legal responses falling simultaneously within, or sometimes at the border between, two categories.

Additionally, in the last decade the EU Commission constantly called for *"addressing segmented labour markets, through reforms in line with the "flexicurity" approach that shift the focus from protection on the job to employment security in the market"*⁷.

This paper deals with the mainstream approach to addressing segmentation of the labour market and with the reforms adopted or proposed in different countries, supposedly aimed at boosting employment rates cut down by the current economic crisis⁸ that are purportedly consistent with this approach.

It will be argued that the mainstream narrative of segmentation presenting this issue as a matter of two-tier labour markets divided on the basis of the regulation of standard employment relationship and of its termination draws on a very limited set of theories concerning segmentation, namely "insiders-outsiders" theories, somehow merged with some legal theories about segmentation. Significant findings of alternative or successive economic and legal theories on this issue are disregarded by the mainstream approach: this results in an oversimplification, which hardly corresponds to the reality of the

⁷ EU Commission, *Commission Working Document, European Commission Background Paper to the EPSCO Council, The Employment crisis. Trends, policy responses and key actions*, 2009. See also, EU Commission, *Modernising labour law to meet the challenges of the 21st century*, 22.11.2006 COM(2006) 708 final GREEN PAPER.

⁸ A vast literature already exists on the ideas underpinning labour market policies undertaken by European countries and/or supported by European and international institutions: see N. Countouris, M. Freedland, *Labour regulation and the economic crisis in Europe: challenges, responses and prospects*, in J. Hayes, L. Rychly (eds.), *Labour administration in uncertain times. Policies, Practices and Institutions*, Cheltenham, 2013, pages 66-94; S. Deakin, A. Koukiadaki, *The sovereign debt crisis and the evolution of labour law in Europe*, in N. Countouris, M. Freedland (eds.), *Resocialising Europe in a time of crisis*, Cambridge, 2013, pages 163-188. S. Sciarra, *Common places, new places. The labour law rhetoric of the crisis*, in WP CSDLE "Massimo D'Antona" .INT 92/2012; C. Barnard, *The Financial Crisis and the Europlus Pact: a Labour Lawyer's Perspective*, in *Industrial Law Journal*, 41, 2012, pages 98-114.

European labour markets.

As to the “flexicurity” approach, it has first of all been argued that, if one looks at the convergence in labour policies across Europe, “*there has not been a general tendency towards the adoption of labour market policies designed to deliver ‘flexicurity’: the dominant trend has instead been towards less security*”⁹. Beside the fact that EU Member States may have not satisfactorily re-joined the call for flexicurity, this paper will argue that urging a shift from job protection to “*employment security in the market*” may lead to the neglect of some important features of the employment relationship, the role of job protection and, in general, of employment regulation.

Section 2 will deal with the main ideas underpinning the mainstream approach to segmentation of the labour market and refers to an alternative theoretical explanation of this phenomenon. Section 3 outlines the reforms recently passed in Italy, Spain and Portugal to loosen the protection against unfair dismissal in these countries. Section 4 shows how, despite these reforms purportedly aiming at reducing the gap between the protection of standard and non-standard workers, no significant increase in the protection of the latter occurred: in some of these jurisdictions it was instead weakened. Section 5 questions the very idea of “dual” labour markets, pointing out that working conditions may vary heavily among supposed “insiders” on the basis of various elements unrelated to the scope of unfair dismissal regulations or other legal features. Section 6 outlines some findings of the “insiders-outsiders” economic theories, showing that they do not significantly deal with the legal regulation of unfair dismissal but chiefly focus instead on traditional aspects of the U.S. industrial relations system, one that can hardly be compared with continental European systems where general unionism is largely present. Section 7, however, argues that recent reforms endorsed by the EU Commission, and aimed at the decentralisation of collective bargaining systems in different countries may weaken the “inclusive” nature of industrial relations systems of continental Europe, potentially leading to the marginalisation of non-standard workers. Section 8

⁹ J. Heyes, *Flexicurity, employment protection and the jobs crisis*, in *Work Employment Society* 25, 2011, pages 642-657. See also S. Deakin, *supra*, note 6; L. Zappalà, *Flexicurity e valorizzazione delle capability: l'impulso alla ri-regolamentazione del lavoro a termine*, in WP CSDLE “Massimo D’Antona”.INT – 97/2012; M. Del Conte, *L’influenza del diritto comunitario sul diritto del lavoro italiano fra tutele e flessibilità*, in Mario Napoli, Mariella Magnani (eds.), *Studi Treu, Lavoro, Istituzioni, cambiamento sociale*, Naples, 2011, pages 1435-1449; S. Sciarra, *Is Flexicurity a European Policy?*, URGE Working Paper 4/2008.

underlines that segmentation of the labour market is not a novel phenomenon originating in recent “flexibility-at-the-margin” reforms, but has been a permanent feature of capitalist labour market since the dawn of industrialization and might have been sharpened as a result of entrepreneurial trends towards business de-concentration in the last 40 years, augmenting the divide between core and marginal workforces. Section 9 then argues that proposed reforms aimed at introducing the “single permanent contract” and, in general, policies aimed at reducing dualism between standard and non-standard workers by flattening the relevant legal protection may prove unsatisfactory as they neglect the differences between marginal and core business activities and workforces. Section 10 concludes, remarking the role of job protection and dismissal regulation not only in preserving the employee’s income but also in supporting the effectiveness of fundamental and constitutional rights during the course of the employment: a complete shift from job protection to “*employment security in the market*” is then called into question.

2. The mainstream approach to segmentation: a tale of oversimplification.

As already mentioned, European institutions tend to follow implicitly or explicitly a particular explanation for segmentation of labour markets: segmentation is more often than not referred to as a matter of “dualism” concerning an allegedly “two-tier” labour market where “*insiders*” benefit “*from high levels of employment protection*” while “*outsiders*” are “*recruited under alternative forms of contracts with lower protections*”¹⁰.

In this respect, the Kok Report also argued that “*overly protective terms and conditions can deter employers from hiring in economic upturns or encourage them to resort to other forms of contract, which can have a negative impact on the ability of less advantaged workers – notably young people, women and the long-term unemployed – to access jobs*”.

In order to address these issues, the report particularly advocated “*where necessary*”, altering “*the level of flexibility provided in standard contracts in areas such as periods of notice, costs and procedures for individual and collective dismissal, or the definition of unfair dismissal*” and “*in parallel*” reviewing “*the role of other forms of contract [...] with a view to providing more options for employers and employees depending*”

¹⁰ *Jobs, Jobs, Jobs. Creating more Employment in Europe*, Report of the Employment Taskforce chaired by Wim Kok, November 2003.

on their needs and adequate security for workers".

At the time the report was drafted, then, it had not yet been argued that making available non-standard contracts could foster segmentation of the labour market: on the contrary the report encouraged Member States to "*provide more options*" in this regard; on the other hand, employers' recourse to these working arrangements was already ascribed to excessive protection of standard employees, particularly protection against dismissal.

Notoriously, the EU Commission's 2006 Green Paper endorsed the findings of the Kok Report, thereby validating the idea of segmentation as a result of overly protective regulation of the standard employment relationship and of its termination¹¹; the Commission in the present days still supports the view that segmentation is a "*typical outcome of strict EPL for open-ended contracts*", although less emphasis is now put on making "*more options*" available to employers, with regard to non-standard work¹².

The issue of segmentation was thus mainly reduced to a risk of "two-tier" labour markets predominantly imputed to the scope and strictness of dismissal laws: this approach, however, seems to oversimplify the several origins and aspects of segmentation.

In the abovementioned overview, for instance, Deakin shows how labour market segmentation has been explained through, or related to, different causes, among which policies implemented by employers such as those establishing internal labour markets, often enhanced by the existence of "asset-specific" capabilities¹³, or the practices of those employers who set wages above the market-clearing point or offer job security in order to incentivise their workers, particularly when monitoring the workforce is too expensive or inaccurate (efficiency wage theory)¹⁴. In these cases, it has indeed been argued that it is possible for

¹¹ EU Commission, *Modernising labour law to meet the challenges of the 21st century*, *supra*, note 7. See S. Sciarra, *EU Commission Green Paper 'Modernising labour law to meet the challenges of the 21st century'*, in *Industrial Law Journal*, 36, 2007, pages 375-382.

¹² EU Commission, *Labour Market Developments in Europe 2012*, in *European Economy*, 5|2012.

¹³ P. Doeringer, M. Piore, *Internal labor markets and manpower analysis*, Manpower Administration (DOL) Office of Manpower Research, Washington D.C., 1970; O. Williamson, O., M. Wachter, J. Harris, *Understanding the employment relation: The economics of idiosyncratic exchange*, in *Bell Journal of Economics and Management Science*, 6, 1975, pages 250-278.

¹⁴ See C. Shapiro, J. Stiglitz, *Equilibrium unemployment as a worker discipline device*, in *The American Economic Review*, 74, 1984, pages. 433-444; J. Yellen, *Efficiency wage models of unemployment*, in *American Economic Review*, 74, 1984 200-205.; S. Bowles, *Competitive wage determination and involuntary unemployment: a conflict model*,

"laws that require just cause to increase efficiency" and reduce segmentation rather than foster it¹⁵.

The European Commission and several other institutions and commentators disregarded most of the findings of these theories and focus instead on a particular explanation of segmentation, based on the so-called "insider-outsider" theory, namely a partial elaboration of efficiency-wage theory that – it will be explored further below – stresses the role of trade unions in causing segmentation¹⁶; in addition, particular concern is devoted to the role of the full-time, open-ended, standard employment relation (SER) as a cause of segmentation: this was also a main concern of legal theories regarding segmentation¹⁷.

The European Commission and several other institutions and commentators disregarded most of the findings of these theories and focus instead on a particular explanation of segmentation, based on the so-called "insider-outsider" theory, namely a partial elaboration of efficiency-wage theory that – it will be explored further below – stresses the role of trade unions in causing segmentation.

3. Individual dismissal regulation after the recent reforms in Italy, Spain and Portugal: a tale of deregulation

In Italy, since the mid-90s, the issue of segmentation is more often than not referred as a matter of "dualism" between the labour market(s) of "guaranteed" and "not-guaranteed" workers depending on the scope of the so-called "*tutela reale*" against unfair dismissal, provided by Article 18 of Law n. 300/1970 (*Statuto dei Lavoratori*): insiders are deemed those who are protected by Art. 18, any other worker being an outsider, regardless of the nature of their working relationship (self-employed, temporary or permanent employment)¹⁸.

University of Massachusetts, Department of Economics, 1981; G. Calvo, *Quasi-Walrasian Theories of Unemployment*, in *The American Economic Review*, Vol. 69, 1979, pages 102-107;

¹⁵ D. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, in *Journal of Labor Economics*, 9, 1991, pages 294-305.

¹⁶ A. Lindbeck, D. Snower, *Insiders versus Outsiders*, in *The Journal of Economic Perspectives*, 15, 2001, pages. 165-188; A. Lindbeck, D. Snower, *Cooperation, harassment and involuntary unemployment: An insider-outsider approach*, in *American Economic Review*, 78, 1988, pages 167-88.

¹⁷ See references in S. Deakin, *supra*, note 6.

¹⁸ See P. Ichino *Il lavoro e il mercato. Per un diritto del lavoro maggiorenne*, Milano, 1996; Id., *Inchiesta sul lavoro. Perché non dobbiamo avere paura di una grande riforma*, Milano, 2011. For a critical review of this approach see F. Carinci, "*Provaci ancora, Sam*": *ripartendo*

Protection against unfair dismissal vary significantly in Italy, depending on the size of the workforce employed within a single work unit or by the same employer.

In Italy, if an employer has 60 or fewer employees, or 15 or fewer employees in a single work unit, in case of unfair dismissal the employer can be ordered to either re-engage the employee under a new contract or pay an indemnity varying in general between two-and-a-half and six months' salary, the choice is the employer's.

This protection regime is usually referred as "*tutela obbligatoria*", implying that remedies under this protection only entail monetary sanctions while more effective sanctions, such as reinstatement, are not generally provided (unless the dismissal is deemed discriminatory or retaliatory).

Above these thresholds, before the 2012 labour market reform, in case of unfair dismissal, the employer could be ordered to both reinstate the employee under the original contract¹⁹ and to pay uncapped damages amounting to the employee's salary between the date of dismissal and the date of actual reinstatement (but with a minimum of five months' salary). This regime was provided by Article 18 of the *Statuto dei Lavoratori* and was normally referred as "*tutela reale*", where "*reale*" stood for both "effective" and "real", since reinstatement was seen as a much stronger protection relative to monetary sanctions, almost giving rise – in theory – to something alike "property rights" concerning one's job.

Since the 2012 labour market reform, this latter regime has been diluted. Article 18 of the *Statuto dei Lavoratori* now provides for reinstatement on top of uncapped damages only in case of discriminatory or retaliatory dismissal²⁰.

Within the scope of the "*tutela reale*", these remedies were previously provided in case of unfair dismissal for either disciplinary matters or economic/redundancy reasons; the same would also apply to dismissals not meeting the statutory formal or procedural requirements.

dall'art. 18., in W.P.C.S.D.L.E. "Massimo D'Antona".IT, n. 138/2012; M.T. Carinci, *Il rapporto di lavoro al tempo della crisi: modelli europei e flexicurity "all'italiana" a confronto*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 136, 2012, pages 527-572; V. Speciale, *La riforma del licenziamento individuale tra diritto ed economia*, in *Rivista italiana di Diritto del lavoro*, 2012, pages 521-566.

¹⁹ However, the employee could elect instead to receive an indemnity in lieu of reinstatement, equal to 15 months' salary.

²⁰ See M. Biasi, *The Effect of the World Crisis on Employment Law and Industrial Relations: report on Italy*, forthcoming in *Comparative Labor Law and Policy Journal*.

Without going too deep into the analysis of the current legislation, it is worth noting that remedies are now different for disciplinary and economic dismissals. In both of these cases, however, the role of reinstatement and the amount of damages are significantly limited compared with the pre-2012 regime.

By way of example, reinstatement and damages of up to 12 months' salary only apply if the dismissal was for disciplinary reasons based on events that did not occur. They also apply if the collective bargaining agreement provides for a sanction for misconduct that is less severe than dismissal.

In any other case of unfair disciplinary dismissal, the employer has to pay an indemnity of 12 to 24 months' salary, but not reinstate the employee.

As to economic dismissal, since the 2012 reform, the court may only insist upon reinstatement when the dismissal is for an economic or redundancy reason that is visibly non-existent.

Even in this case, reinstatement is only an option for the court if it could alternatively award an indemnity of 12 to 24 months' salary. The same will also be recognised to an employee in any other cases of unfair economic dismissal.

Courts have not yet developed a coherent set of criteria for reinstatement under the new law: some judgements have been keen to follow an approach of granting reinstatement according to principles similar to those governing the application of the pre-reform regime, whereas many other judgments have started to shape new sets of criteria, whereby reinstatement is significantly restricted.

Even in the absence of a coherent set of case law principles concerning reinstatement, it can be said that dismissal regulations in Italy were materially relaxed by the 2012 reform: damages in case of unfair dismissal are now strictly capped, let alone the possibility of reinstatement: nowadays, it is even debatable whether it still makes sense to label the protection under Article 18 as "*tutela reale*": if *reale* were to be deemed to imply something more than "effective", hinting at something like "real", one could argue that making reference to "*tutela reale*" is now somehow outmoded.

Dismissal regulation has also been significantly loosened in Spain and Portugal over the last years.

In Spain²¹, economic losses, whether current or merely expected, or

²¹ See M.E. Casas Baamonde, M. Rodríguez-Piñero y Bravo-Ferrer, F. Valdés Dal Re, *La nueva reforma laboral, Relaciones Laborales*, 2012, pages 1-39; J. Cruz Villalón, *Los cambios en materia de extinciones individuales en la reforma laboral de 2012*, in *Relaciones*

declining revenues now amount to sufficient cause for fair dismissal for economic reasons. Other economic or objective reasons have been more clearly defined and notice of dismissal was reduced from 30 to 15 days.

Severance pay for standard employment contracts was cut to 33 days' wages per year of service (it was 45 days before the reform) with a 24-month cap – this removes the distinction between a standard employment contract and the employment-promotion permanent contract, introduced in 1997)²².

Employers with less than 50 employees can now hire workers under a permanent employment contract (*Contrato de Apoio a Emprendedores*) subject to a one-year probation period during which the contract can be terminated without severance pay²³.

After the probationary period, severance pay would apply which would be equal to 33 or 20 days' wages per year of service respectively if the dismissal is fair or unfair.

Remarkably, public bodies' authorization is no longer a requirement for collective dismissal.

In Portugal²⁴, the definition of fair individual dismissal was relaxed: senior employees or employees performing complex tasks may now be dismissed for unsuitability (*inadaptação*) without their being a need for the introduction of new technology to which the employee is unable to adapt – this was a requirement before the reform. Other employees may be dismissed for unsuitability if they fail to achieve previously agreed work objectives. The last-in-first-out tenure rule, in case of economic dismissal, was also abolished.

Severance payment for employees hired after 1 November 2011 was reduced from 30 to 20 days' wages per year of service²⁵, with a cap of 12 months – the minimum amount of 3 months no longer applies – and the employer only pays 10 days' wages, the remaining 10 days being paid by

laborales: Revista crítica de teoría y práctica, 2012, pages 121-147; J. Gorelli Hernández, *La reforma laboral de 2012 y su impacto en los despidos individuales*, in *Temas Laborales*, 115, 2012, pages 275-314; S. Bentolila, J. F., Jimeno, J. J. Dolado, *supra*, note 4.

²² Workers hired before February 2012 and unfairly dismissed will be entitled to a weighted average of the former 45-day and the new 33-day regimes, with a 720-day cap.

²³ Employers using these contracts will enjoy substantial fiscal subsidies insofar as the workers remain employed for at least 3 years

²⁴ A. Pestana Nascimento, *A reforma laboral em Portugal*, in *Actualidad Jurídica*, Especial reformas estructurales / Extraordinario-2012, pages 47-61; A. Turrini, *EPL reforms in Europe: A Portuguese way to single contract outcomes?*, 2011 at <http://www.voxeu.org/article/labour-market-reforms-lessons-portugal>.

²⁵ An interim regime was provided for workers hired before 1 November 2011: severance payments will be calculated taking into account tenures under the previous regime (until 31 October 2012) and the new one.

a new employment fund, financed by employers.

Lawmakers in Italy, Spain and Portugal have therefore followed the European institution's call for reducing protection for standard employees; the next section shows, however, that the same cannot be said for the appeal to better protect non-standard work.

4. Reforms of non-standard contracts in Italy, Spain and Portugal: *Much Ado About (Almost) Nothing.*

As already mentioned, recent reforms of the Italian, Spanish and Portuguese labour regulations did not only concern protection against dismissal²⁶.

In Italy, the purported goal of lawmakers was a general reshaping of labour protection in order to address the issue of dualism in the labour market. This was also meant to be done by reviewing the existing regulation of non-standard forms of employment.

According to the very first article of the relevant act, the reform was aimed at *"redistributing workers' protection more equitably, on the one hand by countering the misuse of the legal schemes already introduced in order to provide flexibility [in the labour market], on the other hand by adapting dismissal regulations to the changed [business] environment"*.

It is noticeable the alleged attempt to even – or, at least, to reduce – the inequality between the situation of those who have relative job stability because they are granted effective protection against unfair dismissal, and workers who do not enjoy such stability. The reform is then professedly in line with the EU Commission's appeal to reduce the protection against unfair dismissal of standard employees whilst providing *"protection to those left outside or at the margins of the job market"*.

Article 1 of the reform act²⁷, then, seems to sanction an "exchange" between greater flexibility in the standard employment relationship of insiders, gained by loosening protections against dismissal, and less flexibility at the margin, to better protect the outsiders, with the purpose of reducing the dualism of the labour market.

Similarly the Spanish reform's preamble declared that its provisions aim to *"enhance the efficiency of the labour market as it is linked to the reduction of labour dualism, with measures affecting chiefly the termination of employment contracts"*²⁸.

²⁶ See references, *supra*, notes 20, 21, 24.

²⁷ Article 1, l. 28 Giugno 2012, n. 92

²⁸ Article II, Real Decreto-ley 3/2012, de 10 de febrero, de medidas urgentes para la reforma del mercado laboral

The legal measures put in place to counter dualism in the labour market can nonetheless be called into question.

The recent Italian reforms loosened unfair dismissal regulations but did not appreciably increase protections for non-standard employees.

The law, indeed, restricted the regulation of parasubordinate “project work”: for instance, project workers’ compensation must now comply with minimum compensation levels set out by national collective bargaining agreements for parasubordinate workers or aligned with minimum salaries provided by those agreements. Moreover, the law clarified that “project work” cannot be entered for the performance of very simple and repetitive tasks. The reform also clarified that, when a proper “project” is not provided, parasubordinate contracts are to be deemed subordinate under a non-rebuttable presumption.

A rebuttable presumption of parasubordination was instead introduced for non-parasubordinate self-employment when some conditions apply²⁹. This presumption would operate in combination with the abovementioned non-rebuttable presumption if a proper project were not provided, possibly leading to reclassification under a subordinate contract.

According to the abovementioned categorization of legal techniques³⁰ aimed at addressing segmentation, these measures may be classified under the first category, as they widen the scope of protective regulation and combat the use of bogus self-employment (including parasubordination), attempting to bring some “grey-area” cases within the scope of employment.

However, these protective elements should not be overestimated. On the one hand, the law merely restates some principles already applied by the majority of case law, for example, most courts were already considering the presumption of subordination in cases where a proper “project” did not exist as a non-rebuttable one. On the other hand, the really new protections, such as the minimum compensation provisions or the rebuttable presumption of para-subordination, could easily drive employers to resort to other non-standard contracts that were further liberalized.

In particular, the law abolished the need to link fixed-term contracts and temporary agency work to an objective reason for the first contract

²⁹ The rebuttable presumption will operate if two of the following requirements are met: (i) the activity exceeds eight months a year for two consecutive years; (ii) the income from such activity is below c. 19,000 Euro and it is equal to the 80 per cent of the overall revenues earned by the self-employed worker during the past two years; (iii) the self-employed worker has a workstation at the principal's premises.

³⁰ See S. Deakin, *supra*, note 6.

up to 12 months – according to the majority of case law, objective reasons were also to be “temporary” in nature for fixed-term employment. This is a material liberalization because most of these contracts are entered into for very short periods.

The 2012 reform tried to balance this deregulation by establishing that no extensions of contracts stipulated without specifying the relevant objective reasons could be provided and by increasing the minimum interruption periods between the previous fixed-term employment contract expiring and a new one beginning with the same employee. Before the 2012 reform, these periods were 10 days and 20 days, respectively, for contracts under and over 6 months; they were increased to 60 and to 90 days respectively. In 2013, however, lawmakers made extensions of fixed-term contracts legitimate up to 12 months in total and decreased the mandatory interruption periods to their original duration.

As a consequence, the use of fixed-term and temporary agency work contracts has now been significantly liberalised in comparison with the pre-2012 regime: this is plainly inconsistent with the purported aim of the 2012 reform.

If one adds this liberalisation to the loosening of unfair dismissal regulations the result is a clear levelling down of employment protection that in no way can be deemed balanced by the renewed regulation of parasubordination.

If we come back to Deakin’s categorization, it could then be said that the recent reforms of the Italian labour market lie somehow both under the first category (with more defined classifications of parasubordination and self-employment) and under the second category (with a reduction of protections for both standard employment and some crucial non-standard contracts).

Inconsistency between the alleged purpose of the reforms and their actual scope, however, is not limited to Italy. In Portugal, severance payments for fixed-term employees were reduced from 36 or 24 days’ wages per year of service (respectively for contracts shorter or longer than 6 months) to 20 days: the reform therefore significantly affects workers with shorter contracts, with their severance cut by more than 1/3. In Spain, severance pay will be slightly increased from 8 to 12 days’ wages per year of service for fixed-term employees.

It can, therefore, be said that the part of the reforms concerning non-standard workers was either contradictory with the alleged purpose of bettering their conditions (Italy and Portugal) or still feeble (Spain).

In Spain, however, an important reform had been passed in 2007

introducing significant protections for economically dependant self-employed workers³¹. This may also bring the set of Spanish reforms adopted in the last decade within both the first and the second of the above-mentioned categories, with legal techniques aimed at widening the scope of protective legislation coupled with a significant levelling-down of the protection for open-ended employment and a weak levelling-up concerning non-standard workers³².

It may however be incorrect to lump the 2007 and the 2010-2011 reforms together, as they were adopted in a very different economic and institutional situation; anyhow, the recent weakening of the regulation governing dismissal of standard employees seems to outweigh the benefits introduced by the Spanish lawmakers with regard to atypical contracts³³.

One can then argue that the alleged reduction of dualism in the Spanish labour market was mainly carried out at the expense of open-ended employment was not balanced by a corresponding levelling-up of the protection for the remaining workforce. The same can be said about the latest reforms in Italy and Portugal³⁴.

5. Can legal regulation actually generate “dualism” of labour markets?

After this brief overview of the legal measures adopted in different EU Member States currently facing serious economic downturn in order to combat dualism in the labour market, it is now time to discuss more deeply the very ideas looking at “dualism” chiefly as a direct result of the scope of the legal rules governing standard employment relationships and, in particular, the regulation of dismissal.

It has been argued above that the mainstream approach to segmentation – endorsed by the EU Commission – couples elements of “insiders-outsiders” economic theories with the findings of some legal theories that focus on the relevant role of the standard employment relationship; under this approach, workers employed under a standard employment relationship are often referred as “insiders”.

³¹ Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo (LETA).

³² The last reforms in Italy, Spain and Portugal also affected the system of unemployment benefits and, in some cases, also involved monetary incentives /subsidies aimed at the “stabilization” of workers: it could thus be said that they also partially fit in the third set of legal techniques categorized by Simon Deakin.

³³ M. Rodríguez-Piñero Royo, *La forza del mercato: le riforme del diritto del lavoro spagnolo durante la crisi finanziaria mondiale*, in *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 137, 2013, pages 91-106.

³⁴ See also S. Deakin, A. Koukiadaki, *supra*, note 8.

As argued at Section 2, this approach tends to ignore the results of both other economic theories concerning segmentation of the labour market and of legal theories that warn against over-estimating the role of law in influencing other social systems such as the economic one³⁵: legal rules and their revisions do not mechanistically influence the economic system or drive changes into it.

In light of this, considering the regulation of standard employment contracts and particularly the relevant regulation of dismissal as the main cause of segmentation in the labour market is unconvincing. One might indeed argue that the very idea of a clear-cut and simple "dualism" in the labour market of modern advanced economies is an over-simplification: deeming "insiders" all workers hired under a standard employment contract and subject to dismissal regulation, for instance, on the one hand overlooks substantial differences in working conditions among these workers, and, on the other, it disregards many extra-legal factors affecting these conditions.

By way of example, working conditions vary widely according to the geographical location of the firm (for example, urban or rural region, developed or depressed area within a country) or to its size (one can hardly compare, in this respect, a company with a workforce of 100 people and one with a workforce of 1,000, although they would be subject to the same dismissal regulations in most of the jurisdictions differentiating dismissal regimes on the basis of the workforce's size, such as Italy, Spain and Germany).

In addition, working conditions often differ depending on the ownership and corporate structure of the employer and – to some extent – also according to its nationality: work organizations and human resources cultures can vary significantly between a family-run enterprise and companies belonging to a multinational group.

Assuming the labour market to be dual also seems to underestimate differences depending upon levels of professionalism, the nature of the tasks carried out and the relevant classification or job role within a company or, to stay with the personal characteristics of employees, their skills and their "employability" within the labour market, or their level of education.

Working conditions may significantly be affected by the degree of

³⁵ See S. Deakin, *supra*, note 6; R. Rogowski, *Reflexive labour law in the world society*, 2013, Cheltenham; S. Deakin, R. Rogowski, *Reflexive labour law, capabilities, and the future of social Europe*, in R. Rogowski, R. Salais and N. Whiteside (eds.): *Transforming European employment policy: Labour market transitions and the promotion of capability*, Cheltenham, 2011.

unionization within a company, the presence of trade unions and employees' representative bodies at the workplace, the existence and quality of labour relations at the shop or enterprise level. Even more, it is impossible to overlook the application of sector- and/or enterprise- or shop-based collective agreements and – *ceteris paribus* – the economic sector or industry: we could hardly explain, otherwise, outsourcing practices motivated by the desire to change the applicable collective bargaining agreements.

For all these reasons, it is simplistic to represent advanced economies' labour markets as dual as a function of the discipline of dismissal.

If one considers the Italian labour market, for instance, it is unsatisfactory to assume Article 18 of *Statuto dei Lavoratori* as a watershed between insiders and outsiders. There are, for example, some insiders who are outside the scope of Article 18 in Italy, such as executives (*dirigenti*)³⁶: in the vast majority of cases, they enjoy contractual protection against unfair dismissal, either set out by collective agreements or by individual terms of employment. This protection is more often than not much higher than that afforded to comparable managers in other advanced countries³⁷.

On the other hand, it is unrealistic to define as "insiders" those workers who, albeit falling within the scope of *tutela reale*, carry out an unskilled repetitive and/or manual job, possibly employed by firms with little or no unionization or those workers to whom no collective agreements or "minor" collective agreements apply.

In light of the above, it is not convincing to see legal protection against dismissal as a breakpoint for working conditions in labour markets, regardless of the type of remedy that may be awarded under the relevant legal system: working conditions vary widely irrespective of the scope of legal protections on the basis of circumstances that do not regard legal regulation and the extent to which the legal reforms currently addressed to segmentation may alter those conditions seems very limited in scope.

³⁶ Under Italian law this is the highest category of employees. *Dirigenti* may also be appointed by shareholders as members of the company's board of directors of a company (*amministratori*) but this is not always the case in Italy.

³⁷ Collective bargaining agreements for executives often provide for a supplementary indemnity in case of unfair dismissal that may amount up to 20 months' salaries of total compensation (including averages of bonus and benefits in kind paid in the last 36 months of employment) and may increase if executives meet certain age requirements (usually when they are between their mid-fifties and mid-sixties). Supplementary indemnities are due on top of notice periods or payment-in-lieu.

6. “Insiders-outsiders” models and continental European unionism: please handle with care!

Segmentation, furthermore, undoubtedly also affects labour markets of countries where no strong or general rules restricting dismissals exist, such as the United States³⁸.

It is noteworthy that the scientific debate around the conflicts of interest between outsiders and insiders and its effects originally developed in the United States and that the relevant literature does not focus on the scope of dismissal regulation; it traditionally emphasised the role of unions and now also stresses, more generally, the replacement costs that companies incur in replacing insiders with outsiders.

Replacement costs include *“the costs of hiring, firing and providing firm-specific training, but further costs can arise from the attempts of insiders to resist competition with outsiders by refusing to cooperate with or harassing outsiders who try to underbid the wages of incumbent workers”*³⁹.

These models concentrate on the features of the United States’ labour market and mainly refer to the traditional United States model of industrial relations, a particularly “exclusive” model, historically centred on the male breadwinner and that, in the past, showed a potentially discriminatory character against women and minorities.

The “insider/outsider” literature often refers to what the insiders “do” or “try to do” to improve their position at the expense of outsiders and/or the employer, as if they constituted an entirely homogeneous social entity, capable of behaving “as one single man”.

It seems evident that these models were designed by making reference to “occupational” and mainly enterprise- or shop-based trade unionism, traditionally making use of union-shop clauses: under this trade union model, it is theoretically possible to coordinate actions of workers already employed against those seeking employment, especially if the latter were willing to accept worse working conditions than those employed.

With many reservations, it could then be argued that the “insiders/outsiders” models might provide an account of some features of the United States’ industrial relations system.

Those same theories, however, are hardly applicable to the reality of

³⁸ Even if some restrictions on dismissal exist in almost all the States of the USA, see, AUTHOR, *Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment*, in *Journal of Labor Economics*, 2003, 21, 1.

³⁹ A. Lindbeck, D. Snower, *Insiders versus Outsiders*, *supra*, note 16.

labour markets in continental Europe, where trade union movements historically follow very different union traditions and labour market strategies, based on “inclusive” policies and where trade unions are traditionally organized on a national, multi-employer or cross-sectoral basis. It has indeed been argued that general unions organizing workers across the occupational lines may counter segmentation in the labour market⁴⁰.

It seems unrealistic to imagine the insiders acting in a co-ordinated fashion to the detriment of outsiders in continental European labour markets: where trade union action is predominantly carried out on a multi-employer basis, fulfilling systematic marginalisation against outsiders would be much more complicated, also from a reputational stance.

Even more difficult is to imagine such marginalisation as carried out by insiders if they were defined as those who fall within the scope of protection against unfair dismissal, given the aforementioned heterogeneity of these subjects and of their conditions of work and the related occupational or sectoral interest, in advanced labour markets.

Moreover, it must again be noted that these theories do not focus on a single aspect as a dividing factor. Indeed, according to the relevant literature *“the insider-outsider distinction provides insight on a wide number of divides: employed versus unemployed workers, formal versus informal sector employees, employees with high versus low seniority, unionized versus nonunionized workers, workers on permanent versus temporary contracts, skilled versus unskilled workers, the short-term versus the long-term unemployed, and so on”*⁴¹.

Also for this reason, identifying insiders and outsiders within labour markets on the basis of the scope of the rules restricting dismissal is not convincing.

7. Decentralisation of collective bargaining and the risk of marginalisation of non-standard workers

In the previous section it has been argued that the current mainstream approach to labour market segmentation and the legal measures adopted in several countries seem unsatisfactory. On the other hand, other topical labour law reforms’ paths, unrelated to the scope of

⁴⁰ S. Deakin, *supra*, note 6; W. Sengenberger, *Labour market segmentation and the business cycle*, in F. Wilkinson (ed.), *The dynamics of labour market segmentation*, London, 1981.

⁴¹ A. Lindbeck, D. Snower, *Insiders versus Outsiders*, *supra*, note 16.

standard employment contracts and the relevant dismissal regulations, could, in the future, spur marginalisation of outsiders.

In the past years, several measures aimed at decentralizing collective bargaining have been taken in different European countries⁴²: an issue that seems to be disregarded, in this respect, is how decentralization could affect the conduct of trade union movements towards non-standard workers and “outsiders” in general.

As stated in the previous section, the organization of trade unions on a general and/or multi-employer basis in continental Europe drives unions towards a traditionally “inclusive” approach: the more the workers covered by collective bargaining and employment protection the better. A different, “exclusive” approach would be difficult to implement on a multi-employer basis and would not be easy to conceal, thus potentially damaging the unions from a reputational standpoint.

“Exclusive” approaches to workers’ protection could instead stem from single-employer and/or “occupational” unionism and collective bargaining, possibly leading to marginalisation of outsiders.

It goes without saying that decentralization of collective bargaining does not necessarily convey these adverse effects and that they could also be prevented through a proper management of decentralization.

European institutions, however, apparently overlooked this when they endorsed a controversial 2011 reform regarding decentralization of the Italian collective bargaining system⁴³.

Significant steps towards regulated decentralization had already taken in the first part of 2011 by the social partners; a cross-sector framework agreement (the 2011 agreement) had been stipulated between the most representative union confederations and the main employers’ association: in particular, national industry-wide collective agreements were called to devolve big parts of employment regulation to firm-level agreements.

In August 2011, however, during the severe financial crisis of the Italian public debt, the government decided to intervene. By decree it approved a provision (Art. 8, Decree 138/2011-Law 148/2011) regulating the decentralization of collective-bargaining agreements in a very different way from the 2011 agreement. In particular, Art. 8 stated that firm-level agreements could derogate from, and would prevail over, the provisions of employment laws and of national collective bargaining

⁴² See essays published in R. Blanpain, *Decentralizing Industrial Relations and the Role of Labor Unions and employee Representatives*, The Hague, 2007.

⁴³ EU Commission, Commission Staff Working Document, In-Depth Review for ITALY in accordance with Article 5 of Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances, SWD(2012) 156 final.

agreements in striking contrast to the 2011 Agreement, according to which national agreements would decide methods of devolution to decentralized agreements.

Remarkably, Art. 8 allows enterprise- or shop-level agreements to regulate non-standard work such as fixed-term employment, part-time employment or temporary agency work, or parasubordinate work and self-employment⁴⁴.

Moreover, decentralized collective agreements could derogate from the statutory joint-liability regime provided in favour of workers of a contractor or subcontractor in case of outsourcing and, most notably, they could also derogate from legal protections against unfair dismissal.

Nothing in Art. 8 prevents decentralized agreements from derogating from these protections only for firms' or shops' new employees, preserving instead the statutory protection for the incumbent workforce.

The 2012 reform followed a different approach on the issue of decentralization of collective bargaining and non-standard work: collective agreements were entrusted with the regulation of minimum compensation for parasubordinate "project workers" and were given the power to further flexibilize fixed-term employment and temporary agency work.

Enabling collective agreements to deregulate non-standard work is not a novelty for the Italian labour market: similar powers had already been conceded by the law since the mid-80s, and it can be said that Italian social partners did not abuse them in order to marginalise outsiders, particularly because of the above-mentioned "inclusive" rather than "exclusive" approach to labour regulation of Italian trade unions.

Yet these powers were traditionally chiefly granted only to national collective agreements and were much narrower in scope than those conceded to enterprise- or shop-level agreements under Art. 8.

According to the 2012 reform, the scope of possible derogations from the law was again limited in scope and entrusted to industry-wide collective bargaining.

However, in 2013 the lawmakers reversed their approach and granted the same powers to decentralized agreements; moreover, Art. 8 was neither repealed nor amended by the 2012 and 2013 reforms.

In light of the above, the risk of Art. 8 encouraging opportunistic conduct against outsiders at the workplace cannot be ruled out: it is worth noting that also in this case outsiders would not entirely match workers falling outside the scope of dismissal regulation, if one considers

⁴⁴ See, M. Biasi, *supra*, note 20.

that firm-level collective agreements could also be in detriment of employees of contractors or subcontractors that may well be covered by dismissal protection under Art. 18 of *Statuto dei Lavoratori*.

It can therefore be argued that, despite their claimed goal to balance the situation of insiders and outsiders in the labour market, recent reforms in Italy also included provisions that may go absolutely in the opposite direction.

Again, it must be stressed that decentralization of collective bargaining cannot automatically be associated with opportunistic behaviour of standard employees: in northern Europe, for instance, flexibility measures are specifically provided *via* collective bargaining, in particular through a derigation from sector-level to firm-level agreements. This provides the system with an appreciable degree of flexibility within a general system of regulation and it has not lead to a marginalisation of atypical workers, even if these systems may somehow begin to creak⁴⁵.

In other European countries, such as Italy, Spain and Portugal, however, the recent reforms significantly untied firm-level collective bargaining from industry-wide agreements and legal regulations⁴⁶: the risk is the stipulation of firm-level collective agreements outside a general regulation framework, posing serious problems in terms of workers' protection. Moreover, this could induce a centrifugal development of industrial-relations systems possibly leading to a "de-generalization" of trade-union action with potential negative effects on the weaker part of

⁴⁵ See M. Rönmar, A. Numhauser-Henning, Flexicurity, Employability and Changing Employment Protection in a Global Economy. A study of labour law developments in Sweden in a European context, Lund University, 2012. In Denmark, J. Due, J. S. Madsen J. S., The Danish Model of Industrial Relations: Erosion or Renewal?, in *Journal of Industrial Relations*, 50, 2008, pages 513-529, speak of "Centralized decentralization", covering "both a controlled delegation of bargaining rights from sector level to enterprise level in the bargaining system, and, at the same time, implies that the norms and values of the central system are retained down through the delegation process". They however argue that "despite the relative strength of the Danish model [a] comprehensive analysis of developments in the Danish labour market over the past decade shows that here too it is possible to discern clear tendencies towards erosion of the collective regulation [...]. Centralized decentralization would appear to be evolving in the direction of a kind of 'multi-level regulation', in which the controlling role of the sector organizations is being challenged".

⁴⁶ The EU Commission welcomed decentralisation of collective bargaining systems also with regard to Spain and Portugal. See EU Commission, Commission Staff Working Document, *Assessment of the 2012 national reform programme and stability programme for SPAIN*, SWD(2012) 310 final and EU Commission, Commission Staff Working Document, *Assessment of the 2012 national reform programme and stability programme for PORTUGAL*, SWD(2012) 324 final. See also S. González Ortega, *La negociación colectiva en el Real Decreto-Ley de medidas urgentes para la reforma del mercado laboral*, in *Temas Laborales*, 115, 2012, pages 85-134.

the workforce, including non-standard workers.

8. Much before “flexibility-at-the-margin”: is labour market segmentation just a feature of our times?

When advocating decentralisation of collective bargaining, therefore, European institutions tend to manifestly overlook its potential detrimental effect on atypical workers.

This, however, does not come as a surprise: following a narrative whereby segmentation is a function of the scope of standard employment relations and all the workers covered by dismissal regulation are regarded as “insiders”, one may overlook other typical elements of differentiation across the labour market, such as the ones described in Section 5.

As already mentioned, this mainstream approach and the related “insiders-outsiders” narrative neglects consideration of other theories on segmentation of the labour market that seem to provide for a more comprehensive account on this issue.

It can be noted, for instance, that segmentation is not a recent occurrence that could be chiefly imputed to the “flexibility-at-the-margin” policies adopted in the last decades.

The existence of a “primary” and a “secondary” labour market is not a phenomenon of our times: from the dawn of industrialization certain categories of workers have enjoyed better economic and regulatory conditions in comparison with “weaker” workers; a difference in the condition of workers involved subcontracting or other forms of business dis-integration, such as home workers has always existed⁴⁷.

It could be said, however, that, during the last forty years, a mainstream business trend towards de-concentration of big firms and outsourcing can be seen, which has given rise to business structures following a “core/periphery” pattern: firms have tended to progressively divest those parts of their production cycle which are not relevant to their core business⁴⁸.

This has swollen the ranks of “contingent” or “marginal” workforce, hired under contractual arrangements that are typical of vertical disintegration, such as contracting or subcontracting or non-standard

⁴⁷ See L. Mariucci, *Il lavoro decentrato. Discipline legislative e contrattuali*, Milan, 1979.

⁴⁸ J. Atkinson, *Flexibility, uncertainty and Manpower strategy*, Report n. 89, Institute of Manpower Studies, Brighton, 1985; Id., *Manpower strategies for flexible organizations*, in *Personnel Management*, 1984, pages 28-31. See also, L. Hunter, A. McGregor, J. MacInnes, A. Sproull, *The ‘Flexible Firm’: Strategy and Segmentation*, in *British Journal of Industrial Relations*, 31 1993 383-407.

working contracts⁴⁹. By contrast, workers employed within core business' sectors tend still to be offered significant job stability through open-ended employment contracts.

Very often, the contingent workforce is employed at the margin of business production, executing activities that require a low level of professionalism or skills.

These activities normally display very low asset-specificity and require very limited training, significantly reducing the cost of replacing a worker assigned to them. Non-standard workers such as fixed-term employees and temporary agency workers (TAW) may be particularly affected in this respect, since – according to labour market statistics – they markedly tend to carry out unskilled work⁵⁰. For this reason it does not seem possible to improve the working conditions of the contingent workforce by lowering the levels of protection of standard employees.

It is arguable that loosening, or eliminating, protection against dismissal would lower the incentive to resort to non-standard contracts and to subcontracting, albeit subcontracting did exist long before the introduction of dismissal regulations in several countries⁵¹. However, this would not necessarily increase the contingent workforce's job stability, since its low asset-specificity makes the replacement of marginal workers easy and cheap.

Core/periphery models may represent an explanation of labour market segmentation that is more accurate than describing the labour market as divided between insiders and outsiders on the basis of the scope of dismissal regulations: entrepreneurial strategies aimed at curbing production costs and making business organizations leaner can be seen as one of the fundamental causes of segmentation even if it is not taken

⁴⁹ H. Collins, *Independent contractors and the challenge of vertical disintegration*, in *Oxford Journal of Legal Studies*, 10, 1990, pages 353–380.

⁵⁰ This is a longstanding occurrence in the Italian labour market, see L. Cavallaro, D. Palma, *Come (non) uscire dal dualismo del mercato del lavoro: note critiche sulla proposta di contratto unico a tutele crescenti*, in *Rivista Italiana di Diritto del Lavoro*, 2008, pages 507–528. See also G. Alteri, L. Birindelli, F. Dota, Giuliano Ferrucci *Un mercato del lavoro sempre più "atipico": scenario della crisi*, Rapporto di Ricerca n. 08/2011, IRES CGIL, 64, reporting that 71% of Italian TAWs were carrying out unskilled working activities in 2011. According to Rapporto Isfol 2012, *Le competenze per l'occupazione e la crescita*, Rome, 2012, temporary workers show higher rates of overqualification. Low-skill workers are overrepresented among fixed-term in Spain, according to S. Bentolila, J. F., Jimeno, J. J. Dolado, *supra*, note 4. Also in the U.S.A., non-standard workers tend to carry out unskilled jobs: see data in Kellberg, *Flexible Firms and Labor Market Segmentation: Effects of Workplace Restructuring on Jobs and Workers*, in *Work and Occupations*, 30, 2003, pages 154–175.

⁵¹ G. Giugni, *Organizzazione dell'impresa ed evoluzione dei rapporti giuridici. La retribuzione a cottimo*, in *Rivista di Diritto del Lavoro*, 1968, pages 1–85.

into account by the mainstream narrative on this topic.

9. All permanent, all precarious: the “single permanent contract”, its mates and its flaws.

In the light of what has been observed in the previous part, flattening employment protections in order to reduce the gap between standard and non-standard workers would hardly result in better working conditions or higher job stability for marginal workers operating outside employers' core businesses.

It is, instead, the EU Commission's belief that a *“reduction of segmentation in the labour market [...] could be facilitated by altering employment protection legislation, by for instance extending the use of open-ended contractual arrangements with a gradual increase of protection rights to diminish the existing divisions between those holding atypical and permanent contracts”*.

According to the Commission, a set of policies to be encouraged in this respect *“includes the adoption of a «single permanent contract», replacing the existing legal asymmetry between permanent and fixed-term contracts”*⁵².

The *“single permanent contract”* has been promoted in different European countries by some economists and lawyers⁵³: it would be an open-ended employment contract with a long (on average 2–3 years) probation/consolidation period during which employees would not be covered by the ordinary protection against unfair dismissal and their contract could be terminated, subject to the payment of an indemnity varying upon the relevant length of service.

A significant debate took place in last few years in Spain and Italy, concerning the *“single permanent contract”*⁵⁴.

Several bills were presented to the Italian parliament in this respect,

⁵² EU Commission, *Employment in Europe 2010*. See also, Id., *Labour Market Developments in Europe 2012*, *supra*, note 12.

⁵³ S. Bentolila, J. F., Jimeno, J. J. Dolado, *supra*, note 4; P. Ichino, *Inchiesta sul lavoro*, *supra*, note 18; J. Andrés, *A Proposal to Restart the Spanish Labour Market*, 2009, available at <http://www.crisis09.es/PDF/restart-the-labor-market.pdf>; S. Bentolila, J. J. Dolado, J. F. Jimeno (2008), *Two-Tier Employment Protection Reforms: The Spanish Experience*, CESifo DICE Report 4/2008. P. Cahuc. F. Kramarz, *De la précarité à la mobilité, vers une sécurité sociale professionnelle*, Rapport pour le Ministre de l'Economie et des Finances, La documentation Française, 2004 available at ladocumentationfrancaise.fr/rapports-publics/054000092/index.shtml; O. J. Blanchard, J. Tirole, *Contours of Employment Protection Reform*, MIT Department of Economics Working Paper 03-35, 2003;

⁵⁴ See L. Zappalà, *supra*, note 9; P. Gete, P. Porchia, *A real options analysis of dual labor markets and the single labor contract*, in MPRA (Munich Personal RePEc) ArchivePaper, No. 34055, 2011.

but were not included within the last reforms. Nonetheless, some measures that may have an impact on the labour market akin to the potential effects of the introduction of a single permanent contract were recently approved in some jurisdictions. In Spain, for example, this is the case of the above-mentioned “employment contract to support entrepreneurs” (ECSE), a contract whereby a statutory probationary period is in force for one year, irrespective of the job position/role in firms whose workforce is under 50 employees. In the UK, the qualifying period before an employee accrues unfair dismissal rights was raised from 1 to 2 years in 2012⁵⁵.

These measures may be comparable to the introduction of the SPC as they allow employers to dismiss workers for a long period of time before the latter acquire full unfair dismissal rights⁵⁶. Several bills were presented to the Italian parliament in this respect, but were not included within the last reforms. Nonetheless, some measures that may have an impact on the labour market akin to the potential effects of the introduction of a single permanent contract were recently approved in some jurisdictions. In Spain, for example, this is the case of the above-mentioned “employment contract to support entrepreneurs” (ECSE), a contract whereby a statutory probationary period is in force for one year, irrespective of the job position/role in firms whose workforce is under 50 employees. In the UK, the qualifying period before an employee accrues unfair dismissal rights was raised from 1 to 2 years in 2012⁵⁷. Thus, keeping the possibility of dismissing workers outbalanced monetary incentives: this can also provide useful lessons with regard to the SPC, as employers may well opt for paying severance instead of employing workers until they become entitled to unfair dismissal protection.

It goes without saying that this will not always be the case under a SPC regime as employers may not want to disperse firm-specific skills and know-how accrued by their employees, or to avoid the cost of

⁵⁵ K. D. Ewing, J. Hendy, *Unfair Dismissal Law Changes—Unfair?*, in *Industrial Law Journal*, 41, 2012, pages 115-121; E. McGaughey, *Unfair dismissal reform: political ping-pong with equality?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014699.

⁵⁶ Another comparable measure is the abovementioned possibility of entering into fixed-term contracts and of extending them up to 12 months without specifying the relevant business reason in Italy. This allows firms to use fixed-term contract as a sort of “extended” probation period and it is therefore comparable to the long probation/qualifying period discussed in this part, with a major difference: under Italian law, serving dismissal before the expiry of a fixed-term contract is only possible when a just cause of termination exists.

⁵⁷ Data is available at http://www.elconfidencial.com/espana/2013-11-13/exito-del-contrato-de-emprendedores-el-85-es-para-trabajos-de-un-solo-ano_52576/

replacing them⁵⁸; but in case of unskilled labour and a lack of asset-specificity, replacement costs would be particularly low and thus the incentive to substitute workers before they accrue unfair dismissal rights will be paramount.

In such a situation, the risk that unskilled or marginal workers undergo an indefinite series of "probation/qualifying periods" with several employers and are dismissed before accruing full dismissal rights is very high: those workers would still be trapped in a vicious and permanent circle of precarious employment.

The SPC can thus prove blatantly ineffective in protecting "outsiders" such as non-standard workers as they, more often than not, carry out low-skilled activities; on the other hand, the SPC would significantly lower the protection of standard workers as they will not be protected against unfair dismissal before the expiry of a probation/qualifying period much longer than in the past (according to some Italian bills, from 3⁵⁹ to 20 years⁶⁰).

Moreover, it must be noted that the SPC is actually unlikely to be a "single" contract replacing all other forms of working contract in the labour market: if one looks at the Italian bills proposing the SPC, for instance, they all maintain the possibility of entering into fixed-term contracts for temporary reasons and into temporary agency work in order to comply with Directive 2008/104/EC.

Nor it will be possible to eliminate self-employment contracts: the Italian bills, for instance, aim at reregulating self-employment in order to have economically dependent self-employees covered by the SPC legislation on the basis of quantitative remunerative parameters: these

⁵⁸ It is also worth noting According to J. I. García Pérez, V. Osuna, *The Effects of Introducing a Single Open-ended Contract in the Spanish Labour Market*, mimeo, Universidad Pablo de Olavide, 2011, before the equalization of severance-payment amounts described at part 3 above, turnover rate for employees under an employment-promotion permanent contract markedly outdistanced that of standard employees'.

⁵⁹ See d.d.l. 2630/2009 (Camera. Prima firmataria on. Madia); d.d.l. 2000/2010 (Senato. Primo firmatario sen. Neroszi). See also d.d.l. 4277/2011 (Camera. Primi firmatari onn. Raisi, Della Vedova).

⁶⁰ See d.d.l. 1481/2009 (Senato. Primo Firmatario sen. Ichino); 2630/2009; 1873/2009 (Senato. Primo firmatario sen. Ichino); d.d.l 1006/2013 (Primo Firmatario sen. Ichino). This 20-year period would only apply to dismissal for economic reason, a different, more protective, regulation being provided for disciplinary dismissal. However, since according to these bills the court would not be able to review the authenticity of the relevant economic reason, it would be straightforward for employers to avoid the disciplinary dismissal regulation by terminating the contract on the basis of an economic reason.

legal techniques have however been sternly challenged⁶¹ and would have the effect of merely relocating the borders of the “grey-area” between a newly deregulated employment and self-employment rather than provide for adequate protections for the latter.

Therefore, non-standard working contracts will continue to have material relevance in the labour markets even under a SPC regime.

In light of the above, the SPC proposals would then continue to contrast segmentation of the labour market at the expense of standard workers rather than through an increase of non-standard workers protection and job stability: in this respect, then, these proposals materially follow the path of the recent disappointing reforms aimed at reducing labour market segmentation in European Member States.

Notoriously, the SPC idea was significantly inspired by the French *Contrat Nouvelles Embauches*: an employment agreement whereby employees could not challenge a dismissal grounded by economic reasons during an initial period of two years. The *Contrat Nouvelles Embauches* was repealed in France in 2008, after case law had found it in breach of international obligations. In particular, the *Contrat* was held to be an infringement of International Labour Organization (ILO) Convention no. 158 “concerning Termination of Employment at the Initiative of the Employer”.

Pursuant to the convention, employees have the right not to be terminated “unless there is a valid reason” and, in case of termination, the right “to appeal against that termination to an impartial body”. Moreover, French case law held that the initial period of two years was not compliant with the convention’s provision that allows probation or qualifying periods “of reasonable duration”⁶².

The European Commission and other European and international institutions seem to overlook the disappointing experience of *Contrat Nouvelles Embauches* when advocating the SPC. This is quite surprising, given that this measure was repealed a very short time after its enactment because of a blatant breach of an ILO convention; initiatives of Member States aimed at introducing the SPC – particularly if such introduction were encouraged by European institutions – could create a conflict between the labour reforms of those Member States and the ILO protection against dismissal, potentially leading to an awkward clash

⁶¹ See O. Razzolini, *Defining Economic Dependency on the Basis of Quantitative Remunerative Parameters. Is this the Answer to the Increasing Demand for a Social Contract Law?*, in *European Journal of Social Law*, 2011, pages 187-206

⁶² See Cour d’Appel de Paris, Arrêt du 9 juillet 2007, RG n.06/06992; Cour de cassation, civile, Chambre sociale, 1 juillet 2008, 07-44.124.

between international labour standards and measures taken following the recommendations of EU institutions on the one hand and to significant litigation in different Member States, concerning the legitimacy of the SPC regime, as it could breach the obligations of a country under international treaties, on the other.

10. Protections against dismissal as a means of underpinning fundamental and constitutional rights.

The repeal of the *Contrat Nouvelles Embauches* due to its contravention to France's international obligations, offers the opportunity to outline some concluding remarks.

One could wonder why the above-mentioned ILO Convention, as well as many other international or European treaties or charters and national legislation, give so much importance to the right not to be dismissed without a valid reason.

The immediate answer may of course be that regulations against unfair dismissal allow employees' to preserve their job and salary as their main source of income. Some justifications for regulating dismissal can also be drawn on the basis of economic theories⁶³.

However, from a legal standpoint, other justifications for effective dismissal protection cannot be overlooked: regulation against unfair dismissal can be pivotal in securing the exercise of other rights at the workplace, some of which can very well be fundamental or – in some jurisdictions – constitutional rights.

If no protection against dismissal were provided, employees might be reluctant to make use of rights such as the rights concerning working time, sick pay, parental protection or even the right to unionize or to participate to industrial actions since they might be afraid of losing their job were they to do so.

For instance one reason why employers resort to temporary work contracts in Italy, even if – from a legal standpoint – these contracts afford a lower degree of functional flexibility in comparison with a permanent employment relationship may also lie in the fact that, given the temporary nature of these relationship, temporary workers may feel forced to implicitly waive some of their statutory or contractual rights by not exercising them, in order not to displease the employer and try to

⁶³ See P. Ichino, *Lezioni di diritto del lavoro. Un approccio di labour law and economics*, Milano, 2004, chapters II and X.

obtain either an extension or a renewal of their contract⁶⁴.

Regulations granting a certain level of job stability, such as an unfair dismissal regulation, can then prove essential to make other employment and labour rights effective.

A good example in this respect is provided by the case law of the Italian Constitutional Court on the statute of limitation for the payment of salaries. The Civil Code, enacted in 1942, provided for a reduced statute of limitation for claiming unpaid or outstanding salaries. According to the court, the statute of limitation must be held as not running during the course of employment, since "*the fear of being dismissed induces or may induce employees to waive part of their own rights; thus, when such waivers are made during the course of employment, employees cannot be deemed to have acted according to their own free will*"⁶⁵. This principle finds a significant exception when the employees enjoy effective protection of their job stability because the court can order the reinstatement of an employee⁶⁶: in this case the fear of losing one's job is presumed to be restrained by strong unfair dismissal protections.

This case law, then, shows a very close link between actual protection of job stability and the effectiveness of other rights during the employment: it could be argued that a significant shortcoming of the SPC proposal is overlooking this strong link. This seems to be true even for those SPC bills providing very strong protection against discriminatory, retaliatory or arbitrary dismissals, the latter being defined under some of the bills as "*those terminations based upon mere whimsical grounds, meaning trivial reasons totally unrelated to the economic, technical, organizational or productive needs of the business*"⁶⁷.

One of the main aims of the SPC approach is to "secure" a decision to

⁶⁴ V. De Stefano, *Smuggling-in flexibility: temporary work contracts and the "implicit threat" mechanism. Reflections on a new European path*, in, *Labour Administration and Inspection Programme LAB/ADMIN Working Document, 4/2009*, International Labour Organization–Geneva. See N. Kountouris, *The legal determinants of precariousness in personal work relations: a European perspective*, in *Comparative Labor Law and Policy Journal*, 34, 2012, pages 21-46.

⁶⁵ Corte Costituzionale, 10 giugno 1963, n. 63.

⁶⁶ Corte Costituzionale 20 novembre 1969, n. 143; Corte Costituzionale. 29 aprile 1971, n. 86; Corte Costituzionale, 1° giugno 1979, nn. 40-44; Corte Costituzionale, 10 febbraio 1981, n. 13. This was the case of the protection under art. 18 of the *Statuto dei Lavoratori* before the 2012-reform but the exception was firstly introduced with regard to other employment regimes under which reinstatement could be ordered, such as in the case of civil servants. It is debatable whether the exception will continue to apply to employees protected by art 18, since reinstatement is no longer automatically adopted in case of unfair dismissal.

⁶⁷ d.d.l. 1481/2009; 1873/2009; d.d.l 1006/2013, *supra*, note 60

dismiss employees, by exempting employers from providing a valid reason for dismissal and preventing courts from reviewing the authenticity of such reason: in this case providing evidence that discrimination occurred might be extremely burdensome for employees as it would be easy for employers to disguise discriminatory or retaliatory dismissal under any business reason not meeting the very stringent definition of "*whimsical grounds*".

SPC regimes may thus fall short of providing effective protection against discriminatory conduct at the workplace: this could lead to a breach of fundamental and human rights concerning discrimination, enshrined in countless international and European treaties and conventions as well as in many national constitutions.

It is also worth noting that when the qualifying period was first raised to 2 years in the UK in 1985 – a measure that, as argued in the previous paragraph, may have effects comparable to the introduction of the SPC – the House of Lords found that this regulation had had a disparate adverse impact on women⁶⁸: in questioning the 2012-raise it has recently been argued that a risk of disparate impact may now also arise with regard to race and other characteristics such as "*income and education*"⁶⁹.

The same concerns can be expressed also with regard to the SPC proposals: employment regulations making a significant number of dismissals exempt from the need of a valid reason may thus have both direct and indirect discriminatory outcomes.

These concerns may be extended to different approaches to labour market regulation – frequently lumped together under the umbrella-label of "flexicurity" – aimed at substituting "protection on the job" for "protection on the market", as they often seem to artificially "sever" job stability protection from other fundamental employment protection, disregarding the profound links between them, some of which were described above⁷⁰.

It is therefore reductive to see job stability as a mere protection of one's income that can be easily put aside if efficient unemployment

⁶⁸ *R (Seymour-Smith) v Secretary of State for Employment*, [2000] UKHL 12, [2000] 1 WLR 435 and (1999) C-167/97.

⁶⁹ See, E. McGaughey, *supra*, note 55.

⁷⁰ See H. Collins, *Theories of Right as Justifications for Labour Law*, in G. Davidov, B. Langille, *The Idea of Labour Law*, Oxford, 2011, pages 137-155, who argues that the idea of social security systems as a substitute for job protection "*seems to view a job as a merely a means to the end of securing an income. Whilst that may be true for some workers, most people attach more significance to their jobs. The job helps to achieve other primary goods such as self-respect, and can be a way of developing other capacities through dialogue and social interaction*".

benefits and active labour market policy systems were adopted⁷¹, replacing salaries and job protection with unemployment benefits and permanent job training.

These approaches seem to overlook that, during the employment relationship, people are subject to extensive managerial prerogatives and hierarchical powers of employers, which are enshrined in, and protected by, the law. From a legal point of view, one cannot disregard the fact that employment protection is not only granted with the aim of securing the employee's income but also in order to provide for some countervailing powers to these business prerogatives⁷². As argued above, dismissal regulation can play a very important role in underpinning the effectiveness of other fundamental and human rights: this role should not be neglected when discussing amendments and reforms of labour market regulations.

⁷¹ And this does not seem to be the case of many European countries, where unemployment benefit systems were materially shrunk in recent years: see

⁷² See O. Kahn-Freund, *Labour and the law*, London, 1972, who chiefly referred to collective labour law. For an analysis of the impact of collective protection at the individual employment contract level see S. Liebman, *Individuale e collettivo nel contratto di lavoro*, Milano, 1993.